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No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1941

GREGG CARTAGE & STORAGE COMPANY, HUGH WELLS, TRUSTEE IN BANKRUPTCY OF THE GREGG CARTAGE AND STORAGE COMPANY, AND NORTH-EASTERN TRANSPORTATION COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the District Court (R. 99–104) is reported in 42 F. Supp. 266. The reports of the Interstate Commerce Commission (R. 58–71, 71–82) are reported in 10 M. C. C. 255 and 21 M. C. C. 17.

JURISDICTION

The decree of the District Court was entered on May 19, 1941 (R. 110). The petition for ap-

peal was presented on July 14, 1941 (R. 111), and was allowed on the same day (R. 114). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219 (U. S. C., title 28, secs. 45a, 47a); section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (U. S. C., title 28, sec. 345); and by section 205 (h) of the Motor Carrier Act, 1935,[1] c. 498, 49 Stat. 543 (U. S. C., title 49, sec. 305 (h)).

QUESTIONS PRESENTED

1. Whether the "grandfather" period specified in the proviso of section 206 (a) of the Motor Carrier Act, 1935, extends from June 1, 1935, until the time when the Interstate Commerce Commission acts on the application of a carrier claiming "grandfather" rights.

2. Whether discontinuance of operations by such a carrier as the result of involuntary bankruptcy constitutes an interruption of service over which the applicant had no control, within the meaning of the "grandfather" clause.

STATUTE INVOLVED

The relevant provisions of the Motor Carrier Act, 1935, applicable at the date of the Commis-

[1] This statute was in force on December 12, 1939, the date of the Commission's order. The Transportation Act of 1940, 54 Stat. 898, approved September 18, 1940, renumbered this provision as Interstate Commerce Act, Part II, section 205 (g).

sion's order, December 12, 1939, are set forth in the Appendix, *infra*, pp. 36–38.

STATEMENT

The underlying facts of the case are not in dispute, and the findings of the Commission [2] may be summarized as follows:

In 1935 and earlier, Gregg Cartage & Storage Company, an Ohio corporation, operated as a common carrier of general freight between points in several northeastern states (R. 59–60, 72). Its method of operation was to assemble freight at terminals, which it maintained in 12 cities, and to procure transportation of the freight by owner-operator vehicles; Gregg Company performed no over-the-road service with its own vehicles (R. 60).

During the year 1936 Gregg was insured against public liability and property damage by the Central Mutual Insurance Company of Chicago. Upon learning that the insurer was in an unsound financial condition and after it had failed to protect Gregg against some claims, the Gregg Company discontinued its insurance with Central Mutual and placed similar insurance with Auto Mutual Insurance Company, paying the premiums in advance. On January 11, 1937, Central Mutual was adjudged a bankrupt, and ceased to pay any claims (R. 60). In later months of 1937 Gregg was obliged itself to satisfy several sub-

[2] The full Commission adopted the statement of Division 5 (R. 59–62) concerning the facts (R. 73).

stantial claims for damages arising from accidents which occurred in the course of its carriage business during the period when insurance was in effect with Central Mutual (R. 60–61). Gregg also paid additional claims in the amount of approximately $15,000 for loss of cargo, in order to retain the good will of shippers when two other insurers failed to protect Gregg, relying upon technical insurers' defenses under Ohio law (R. 61; 33). In addition, the company was still confronted with approximately 175 claims for personal injury and property damage, estimated to aggregate $200,000. Gregg attempted to settle these claims, conducting in some instances extended negotiations; at length it appeared impossible that all of the demands should be satisfied in full (R. 61).

Gregg had been solvent on June 30, 1937; it then had assets of nearly $200,000, liabilities of $130,000, capital stock of $10,000, a reserve of $30,000, and $25,000 in surplus. By October 30, 1937, it had become insolvent, with debts of $360,000 and assets amounting to only $240,000 (R. 63). The company arranged the filing on October 4, 1937, of a creditor's bill in the Court of Common Pleas for Cuyahoga County, Ohio (R. 61, 31). On October 5, 1937, that court appointed a receiver with authority to continue operation of the Gregg Company's business. On the same day, other creditors of Gregg filed a petition in bank-

ruptcy against it in the District Court of the United States for the Northern District of Ohio (R. 61).

The state court receiver, in operating the business after October 5, confined himself to effectuating deliveries of shipments en route, without soliciting new business. On October 14, 1937, he filed a petition with the Interstate Commerce Commission to suspend operation without prejudice to Gregg's operating rights under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (R. 61). The petition was denied by the Commission in an order dated November 30, 1937 (R. 61–62).[3]

On October 27, 1937, Gregg was adjudged a bankrupt by the federal court. On October 30 a receiver in bankruptcy was appointed, with instructions to take charge of all the assets and preserve them, pending the election and qualification of a trustee, have an inventory and appraisal made, and prepare for a sale. The federal receiver took over Gregg's business on the same day (R. 61). He confined his management to liquidating the business, and conducted no operations after his appointment. Pursuant to an order of the bankruptcy court, the rights, trade names, and

[3] The Commission gave as its reason lack of power to authorize such a suspension (R. 62).

[4] The trustee, one of appellants here, was appointed near the end of December 1937 (R. 1).

goodwill of the bankrupt estate were sold for $850 at public auction on December 6, 1937, to the Northeastern Transportation Company[5] (R. 62). The receiver in bankruptcy made formal transfer of the operating rights to Northeastern on December 24, 1937 (R. 75).

The Gregg Company had filed an application with the Interstate Commerce Commission on February 12, 1936, for a certificate of public convenience and necessity as a common carrier, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act (R. 59). A hearing was held on June 8 and 9, 1937, before an examiner of the Commission (R. 21). The examiner's report was filed December 17, 1937, and recommended granting the common carrier certificate applied for (R. 7–18). The Northeastern Company and the receiver in bankruptcy filed a joint application with the Commission on January 7, 1938, asking that Northeastern, as Gregg's successor, be substituted as applicant in place of Gregg; action on this application was withheld by the Commission pending a determination of Gregg's rights (R. 62). The management of Northeastern considered a resumption of operations, but decided

[5] Northeastern was organized for the purpose of taking over the business of Gregg Cartage and Storage Company (R. 62). Joseph Gregg, former president of Gregg Company, is Northeastern's general freight agent, and Henry Lockhart, former superintendent of transportation of Gregg Company, is a stockholder of Northeastern (R. 62; 43–46).

against it on the advice of field representatives of the Interstate Commerce Commission (R. 48, 92). On February 11, 1938, the Commission ordered a further hearing on the original application (R. 52), which was held before another examiner on May 4, 1938 (R. 20–21).* The second examiner's report made the same recommendation.

Exceptions to the recommended order were filed by protestant rail carriers, which had appeared throughout the proceedings on Gregg's application (R. 59; 8, 21, 52, 58). Division 5 of the Interstate Commerce Commission denied the application on November 14, 1938, Commissioner Lee dissenting (R. 58, 59, 65). The report of the majority ruled that an interruption of service within the control of the applicant had occurred after October 30, 1937, that the purchase by Northeastern from Gregg had conferred on Northeastern no operating rights, and that therefore neither corporation was entitled to an authorization under the "grandfather" clause (R. 65). A reargument was held before the full Commission (R. 71), and on December 12, 1939, it affirmed the findings and conclusions of Division 5 (R. 71, 79). Five Commissioners dissented from the report (R. 79, 80, 82).

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*This hearing related only to the circumstances of the interruption of Gregg Company's service (R. 24–25). A transcript of the proceedings before the examiner was attached to the original complaint in this case as Exhibit B and appears in the Record at pages 21–50.

Gregg Company and its trustee in bankruptcy then filed a complaint against the United States and the Interstate Commerce Commission in the District Court of the United States for the Northern District of Ohio, Eastern Division, on June 7, 1940, praying that the order of the Commission denying Gregg's application be annulled and set aside and that the Commission be directed to issue a certificate of public convenience and necessity to Gregg (R. 1, 6). The Interstate Commerce Commission and the United States answered on July 23, 1940, and July 26, 1940, respectively (R. 82, 87). Northeastern Transportation Company moved to intervene on August 30, 1940 (R. 88); its motion was granted by the court on September 20, 1940 (R. 90), and Northeastern filed its bill of complaint on the same day (R. 90–93). Answers to this bill were filed by the Commission and the United States on October 18, 1940, and November 5, 1940, respectively (R. 93, 94). An order convening a statutory court of three judges was issued on January 4, 1941 (R. 98). On January 29, 1941, the case was tried to the court (R. 98–99); in a *per curiam* opinion dated February 20, 1941, the court held the Commission's order valid (R. 99–104). It made findings of fact and announced conclusions of law (R. 106–110), and on May 19, 1941, issued its final decree dismissing the complaint (R. 110).

SUMMARY OF ARGUMENT

I

The operations of an applicant for authority under the "grandfather" clause must be *continuous* during the statutory period prescribed for the acquisition of rights. The period extends from June 1, 1935, until the date when the Interstate Commerce Commission acts upon the application; it is not determined by the effective date of the Motor Carrier Act (October 15, 1935) or by the date of the filing of the carrier's application (February 12, 1936, in the case of appellant Gregg Cartage & Storage Company).

II

Gregg's cessation of operations by October 30, 1937, as the result of involuntary bankruptcy did not constitute an interruption of service over which Gregg had no control. The Commission properly ascribed the interruption to business difficulties of the applicant which it would have been possible for the company to avoid; the Commission was not required to probe underlying causes of Gregg's failure and to seek out facts behind the company's act of bankruptcy. The Commission decided appellant Gregg's application in accordance with the construction it has placed on the statutory language in similar cases. Since that construction is warranted by the language and

purpose of the statute and is a reasonable administrative interpretation, it should not be disturbed.

The Commission was justified in holding that the discontinuance of transportation extending from October 30, 1937, until January 7, 1938, (the date of Northeastern's filing of its application for substitution) was attributable to the applicant, and that the period of interruption was sufficient to extinguish the "grandfather" rights. The carrier was not entitled to any period of grace after the cessation of operations because of the provisions of section 212 (a) of the Motor Carrier Act.

ARGUMENT

Section 206 (a) of the Motor Carrier Act, 1935, contains a general prohibition on operation by common carriers in interstate or foreign commerce without a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The "grandfather" proviso in the section directs the Commission to issue a certificate to a carrier, without further proof of public convenience and necessity—

> * * * if * * * such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control * * *.

Appellant's principal contention on this appeal is that the discontinuance of Gregg Company's transportation after October 30, 1937, was an interruption of service over which Gregg had no control (Br. 27–53). They contend additionally that a carrier which operated from June 1, 1935, to October 15, 1935, the effective date of the Motor Carrier Act, is entitled to a certificate without any showing of operation after that period. If the latter contention were sound, the former would be eliminated from the case as an issue. Accordingly, our argument is addressed first to the question of the extent of the period of required operation under the proviso in section 206 (a).

I

AN APPLICANT UNDER THE "GRANDFATHER" CLAUSE MUST SHOW OPERATION FROM JUNE 1, 1935, TO THE TIME OF THE COMMISSION'S ACTION ON THE CARRIER'S APPLICATION

1. *Continuity of operation.*—Appellants urge preliminarily in their discussion of this point that the statute does not require *continuous* operation during the "grandfather" period, whatever the length of the period is determined to be. The contention is untenable in view of the plain language of the statutory provision: "was in bona fide operation * * * on June 1, 1935, * * * and has so operated since that time, * * *." The decision of this Court in *United States* v. *Maher*, 307 U. S. 148, is conclusive against it; in that case a carrier had conducted operations over irregular routes in Oregon and Washington from 1931 until

May 1936; subsequently he did not engage in this transportation. In October 1937 the Interstate Commerce Commission acted upon his application filed in January 1936, denying him authority to operate since his operation had not been continuous but had been abandoned. This Court reversed the decree of a district court setting aside the Commission's order, and expressly approved the Commission's construction of the statute. *Id.* at 155.

The legislative history of the "grandfather" clause affords no support for appellants' contention. As they state (Br. 24), the bill which became the Motor Carrier Act, 1935, originally contained an expressed requirement of "continuous" operation. But it is clear from the statement of Senator Wheeler, chairman of the Senate Committee in charge of the bill, that the striking of the words "continuous" and "continuously" was effected only to insure that there would be no apparent inconsistency between the main part of the clause and that excepting interruptions beyond a carrier's control. See 79 Cong. Rec. 5654. The amended provision carried on the requirement of *continuous* operation aside from the specifically excepted interruptions of service.

2. *Length of the "grandfather" period.*—The Commission has taken the view in administering the Motor Carrier Act that an applicant, in order to establish present operating rights, must show transportation from the "grandfather" date up to the time when the Commission acts on his

application. If another rule had obtained, the carrier in *United States* v. *Maher, supra,* would have been entitled to receive a certificate of public convenience and necessity, since he had been in operation from June 1, 1935, to October 15, 1935 (the effective date of the Motor Carrier Act), and was still operating on January 24, 1936 (the date of Maher's application).[7] However, this Court, in sustaining the Commission's denial of an authorization, said in its opinion:

> * * * Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated," as required by § 206, when the Commission passed upon the application for a "grandfather" certificate, the Commission rightly rejected the application. [307 U. S. at 155–156.]

In a petition for limited rehearing Maher urged that his operating rights should be viewed as determined in the period from June 1, 1935, to October 15, 1935.[8] The petition was denied May

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[7] Appellants here asserted in the District Court that the time when application is filed determines the "grandfather" period (R. 6). The opinion of the court below in dealing with the issue was responsive to that contention (R. 102–103). The Commission and the federal district courts have consistently rejected it. *Hoerman* v. *United States* (No. 852, W. D. Mo., June 5, 1941); *Howard Hall Co.* v. *United States*, 38 F. Supp. 556 (N. D. Ala.); *Atlantic Motor Exp. Inc.*, 12 M. C. C. 576.

[8] Maher was joined in this contention by an *amicus curiae*, counsel for the appellant in *Hoey* v. *United States* (N. D. Ill.

15, 1939. 307 U. S. 649. The opinion of the Court in *Lubetich* v. *United States* (No. 322, this term, decided January 19, 1942), stated in regard to "grandfather" applications by owner-operators:

> * * * The question in both situations is whether the applicant was a carrier, either common or contract, within the meaning of the Act prior to June 1935 and continuously thereafter to the date of the hearing. * * *

We submit that the administrative construction placed on the statute by the Commission, concerning the length of the "grandfather" period, and approved in decisions of this Court, is no longer open to question.

II

DISCONTINUANCE OF GREGG COMPANY'S OPERATIONS AFTER OCTOBER 30, 1937, WAS NOT AN "INTERRUPTION OF SERVICE OVER WHICH THE APPLICANT HAD NO CONTROL"

A. THE POLICY OF THE STATUTE

At the outset, the background of the statute as shown by the announced legislative purpose should be noticed. In section 202 (a) of the Motor Carrier Act, 1935, Congress recited:

> It is hereby declared to be the policy of Congress to regulate transportation by mo-

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October 23, 1939), where the length of the "grandfather" period was in issue. The court there decided against the carrier's interpretation of the statute as requiring operation only until the effective date; this Court affirmed the decree *per curiam* on appeal. 308 U. S. 510.

> tor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; * * *

As the court below pointed out (R. 104), continuous operation in the service being performed by particular carriers is an essential of adequate and efficient public service. Express legislative recognition of continuity as a requirement appears in section 204 (a) of the statute, which provides:

> It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, * * *.

The "grandfather" clause was inserted in section 206 (a) of the Act to permit continued performance, after enactment of the federal regulatory legislation, by established motor carrier businesses of the transportation in which they had engaged on June 1, 1935, and to assure to the public continuation of the service which had been available on the "grandfather" date; in writing the "grandfather" clause Congress proceeded on

the assumption that any carrier which was in bona fide operation on June 1, 1935, and continued so to operate thereafter was rendering a transportation service the continuation of which was required for the public convenience and necessity. Any interruptions of service would prejudice the public interest in available motor carrier transportation, since shippers would still require facilities. The result of any substantial interruption would be diversion of shippers' needs to other modes of carriage, expansion of a competing carrier, or entrance of a new carrier into the field under a certificate of public convenience and necessity issued by the Interstate Commerce Commission on the merits under section 207 of the Motor Carrier Act. The effect of the interrupting carrier's subsequent resumption of operations would be to overcrowd the transportation market in which it competed, aggravating the conditions in the motor carrier industry which the statute was designed to alleviate. Congress, by legislative grace, excepted interruptions over which a carrier had no control.

In view of these considerations, the "grandfather" clause should be narrowly construed in order that achievement of the essential objects of the Act should not be hindered. See *McDonald* v. *Thompson*, 305 U. S. 263, 266.

B. THE FUNCTION OF THE COMMISSION

The ultimate issue in the present case is whether the applicant for a certificate under the

"grandfather" clause has brought its case within the terms of the proviso in section 206 (a): specifically here whether the interruption in Gregg's service after October 30, 1937, was one beyond the company's control. The Interstate Commerce Commission is given the duty of passing on applications, and it must make initial determination of the question whether the facts of an applicant's claim entitle him to a "grandfather" certificate. In doing this, the Commission must make findings of fact; these are conclusive if supported by substantial evidence. See *United States* v. *Maher*, 307 U. S. 148, 154. Questions of expert judgment, going beyond the finding of subsidiary facts, are also presented to the Commission for decision. And here, too, the determination of the administrative body will not be disturbed on judicial review if the determination is warranted and reasonable. *Gray* v. *Powell* (No. 18, this Term, decided December 15, 1941); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177.

The Commission in the present case determined that the Gregg Cartage & Storage Company had not shown that it had been in bona fide operation on June 1, 1935, and continuously thereafter to the time when the Commission acted on its application, since its transportation had ceased by October 30, 1937, and since the interruption which

occurred was not one which had not been within the company's control according to the statutory meaning. Appellants assail that judgment as arbitrary and improper; the Government urges on the other hand that it was informed and correct.

C. CESSATION OF OPERATION OWING TO INVOLUNTARY BANKRUPTCY IS AN INTERRUPTION WITHIN A CARRIER'S CONTROL

1. *The Bankruptcy Act.*—Section 3b of the Act of July 1, 1898, 30 Stat. 546, as amended (11 U. S. C., sec. 21 (b)), provides that an involuntary petition in bankruptcy may be filed against a person who in the preceding four months has committed an act of bankruptcy. Section 3a (11 U. S. C., sec. 21(a)) defines such acts as (1) fraudulent conveyances or concealments of property, (2) transfers while insolvent, (3) permitting, while insolvent, a creditor's lien to attach to property through legal proceedings, (4) assignments for the benefit of creditors, (5) permitting or procuring, while insolvent in either the bankruptcy or equity sense, a receiver to be appointed to take charge of the bankrupt's property, (6) admissions in writing of inability to pay debts and of willingness to be adjudged a bankrupt. The statute has thus made the filing of an involuntary petition contingent upon the happening of specified events with respect to the bankrupt, which Congress has cast in terms of *acts* of bankruptcy on the part of the person against whom the petition is filed.

In *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, a transfer company had contracted to furnish a continuing service and was rendered unable to perform by involuntary bankruptcy. The promisee asserted its claim for breach of contract in the bankruptcy proceeding. Holding that the claim was provable, because founded on an anticipatory breach the Court said (p. 591):

> * * * In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. * * *

The opinion there viewed bankruptcy as the equivalent of a deed or expression breaching the contract on the part of the promisor, and the commission of an act of bankruptcy as a voluntary act done by the bankrupt in the course of its business.*

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* Appellants challenge the authority of this case (Br. 42–44) on the ground that its holding has been superseded by the amendment of section 70 of the Bankruptcy Act (U. S. C., title 11, sec. 110 (b)), which provides that the trustee in bankruptcy shall assume or reject executory contracts within 60 days after adjudication. Congress by inserting this provision in the Chandler Act of course imposed a new rule of positive law in bankruptcy concerning executory agreements,

Gregg Company committed an act of bankruptcy on October 4, 1937, in procuring a creditor's bill to be filed in a state court asking for the appointment of a receiver in equity. The Interstate Commerce Commission said in its report (R. 73) that before bankruptcy the company "had full control of its operation and methods of conducting its business, including the selection of insurance companies to protect it against damage and other claims. It is presumed to know that if it fails to conduct its business in such a way as to provide for obligations incurred by its operation, proceedings in bankruptcy may be instituted against it. Such proceedings, when instituted, are the natural consequence of its voluntary acts and business methods, and where they prevent the continuance of operation, either by the motor carrier or a receiver, they are directly due to the voluntary acts of the motor carrier which lead to the bankruptcy." Thus the Commission ruled that an interruption of service on account of the applicant's bankruptcy was for that reason alone not one beyond its control for the purposes of the Motor Carrier Act, and declined to inquire further into the particular circumstances of the bankruptcy.

2. *The Underlying Causes of a Carrier's Bankruptcy Are Not Material.*—The report of the

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anticipatory breach, and provable claims, but in no way altered the character of acts of bankruptcy or negatived the *rationale* of the Court's decision in the *Chicago Auditorium* case.

majority Commissioners recognized that the source of a particular bankruptcy might be found in purely accidental misfortune rather than in wrongful or even merely negligent conduct on the part of the bankrupt (R. 74). Accordingly, appellants contend (Br. 18, 27) that the Commission erred in not holding relevant the apparent cause of Gregg's business failure. They assert that the unforeseen payment of damage claims was the sole cause, that the company was protected by proper and adequate insurance, and that the effective event in Gregg's history was the insolvency of one insurer and the refusal of two others to indemnify Gregg. Their argument is essentially reducible to the following contention: although an interruption of service may have been within the control of the management in the sense that the transportation service could have continued regardless of the mishap, the interruption ought not to extinguish the applicant's "grandfather" rights if the mishap was not reasonably foreseeable so that the management should have forestalled the interruption. We think that this criterion borrowed from the private law of torts was not what the statute intended to be the test. Rather, the standard is factual, directing the administrative agency standing outside to determine whether the interruption in a carrier's service was in fact avoidable by the carrier without substantial alteration of the transportation performed.

Adoption of the criterion advanced by appellants would compel exact inquiry by the Commission in each case into the circumstances surrounding every act of the bankrupt which played a part in bringing about the financial debacle, in order to determine with reference to each decision on conduct taken by the bankrupt whether the course pursued as a result of choice was reasonably prudent. In employing such a criterion in the present case, the Commission's investigation could not stop at the failure or refusal of insurance companies to pay claims; it would have to extend to the questions whether Gregg should have insured so largely with one company, whether the Central Mutual was a reasonable risk on the basis of its financial position and not chosen primarily for attractively low rates, whether Gregg could by ordinarily diligent supervision of its carrier operations and should have kept the damage claims against it to a smaller total,[10] and whether as an original proposition the owner-operator method of transportation which it employed was prudent.[11] These, in

[10] As of June 30, 1937, Gregg Company had a surplus and reserve of $55,000; if the Commission should find that sound business methods would have confined the company's liabilities within that figure or within some limit commensurate with earning capacity, then it might follow that poor management rather than the failure of the insurance company was the "cause" of Gregg Company's interruption of service.

[11] In order to exhaust the principal inquiry it might have been necessary for the Commission to examine the circumstances of the claims presented and pass on Gregg Company's tort or carrier liability in each case.

broad outline, are some of the lines of inquiry which the Commission must have pursued on appellants' theory of the statute; it would also have been obliged first to determine what elements of conduct on the part of Gregg were contributory and whether in a material degree.

The very great difficulties of such a procedure are evident; the speculative character of the results likely to be produced further persuades against the interpretation of the "grandfather" clause contended for by appellants. Proper construction of the language "interruptions of service over which the applicant or its predecessor in interest had no control" demands that the carrier show that its transportation was interrupted through the agency of an external cause with which the carrier plainly had no connection in transacting its business. The Commission accordingly has taken the position that bankruptcy and other immediate causes of interruption which are engendered by business reverses are not beyond a carrier's control.

3. *The administrative practice.*—In passing on the "grandfather" applications of carriers whose service has been interrupted, the Commission over a long period has adhered to the principles of construction of the exceptive language upon which its decision in this case was reached and which we have stated above. A consistent pattern of adjudication is shown by the reports in cases

where the issue of control over interruption has been raised.

Interruptions of service owing to floods,[12] snow,[13] unsafe[14] or impassable[15] roads, highway construction,[16] or drought where it destroys a carrier's chief source of business[17] have been ruled interruptions over which a carrier has no control. Likewise, the Commission has held that ill health,[18] strikes,[19] or the illegal action of governmental authorities,[20] constitute grounds for holding that an interruption of service is beyond an applicant's control.

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[12] *A. O. & T. Motor Lines, Inc.*, 8 M. C. C. 739, 741; *Waltz Transportation, Inc.*, 10 M. C. C. 30, 33; *Hubert C. Elliott*, 11 M. C. C. 148; *Cardinal Stage Lines Co.*, 2 M. C. C. 583, 585; *Durant Transit Co.*, 7 M. C. C. 264, 266; *Mercury Motors, Inc.*, 7 M. C. C. 557, 558.

[13] *Lewis McKay*, 4 M. C. C. 93, 94.

[14] *Edwards Motor Transit Co., Inc.*, 2 M. C. C. 73.

[15] *Inter-Carolinas Motor Bus Co.*, 21 M. C. C. 633, 635; *Silver Fleet of Memphis, Inc.*, 23 M. C. C. 331, 337; *Walter Stages, Inc.*, 24 M. C. C. 451, 454; *L. & L. Freight Lines, Inc.*, 2 M. C. C. 9, 11; *St. Andrews Bay Transportation Co.*, 1 M. C. C. 306, 307; *Mo-Ark Coach Lines, Inc.*, 4 M. C. C. 55, 56; *Rio Grande Motor Way, Inc.*, 3 M. C. C. 9, 10; *Panhandle Stages, Inc.*, 7 M. C. C. 743, 744.

[16] *Magee Truck Lines, Inc.*, 28 M. C. C. 386.

[17] *Barnes Truck Co., Inc.*, 24 M. C. C. 465.

[18] *H. B. Blackburn*, 20 M. C. C. 747.

[19] *Motor Freight Exp.*, 26 M. C. C. 374; *Transamerican Freight Lines, Inc.*, 28 M. C. C. 493; *Nielson & Peterson*, M. C. 41275, Aug. 11, 1941.

[20] *W. D. Cochran*, 3 M. C. C. 717, 719; *W. H. Tompkins Co.*, 29 M. C. C. 359.

On the other hand, abandonment of operations in unprotesting acquiescence to illegal state action,[21] cessations occasioned by failure or refusal to secure proper license fees,[22] operating authority,[23] or compulsory insurance[24] have been held not to be interruptions of service over which a carrier has no control. And an applicant for "grandfather" authority is held responsible for discontinuing service on account of the dilapidated condition of his equipment,[25] because he cannot secure sufficient business,[26] or cannot transport at a profit the business that is available.[27]

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[21] *West Texas Motor Freight Lines, Inc.*, 6 M. C. C. 598.

[22] *Milwaukee Truck Service, Inc.*, 17 M. C. C. 647, 653; *Crouch Transportation System, Inc.*, 26 M. C. C. 433, 437.

[23] *Paul Stuart*, 10 M. C. C. 470, 471; *Lennerton Motor Transp., Inc.*, 17 M. C. C. 779; *R. E. Perry*, 4 M. C. C. 630, 632; *Thomas James, Jr.*, 14 M. C. C. 723, 724; *M. C. Williams*, 14 M. C. C. 747, 748; *All American Bus Lines, Inc.*, 18 M. C. C. 755, 758; *H. T. Hough*, 20 M. C. C. 55, 56; *T. W. Crooks*, 23 M. C. C. 509, 512; *Paulmaur Transp. Co., Inc.*, 28 M. C. C. 395, 398; *Benjamin Franklin Line, Inc.*, 1 M. C. C. 97, 100; *Motor Express, Inc.*, 3 M. C. C. 315, 318.

[24] *Contract Carriers Sedan Travel Assn.*, 7 M. C. C. 209, 213; *Harry L. Sloan*, 6 M. C. C. 471, 472; *E. S. Lubfin*, 12 M. C. C. 563; *Gulf States Express, Inc.*, 9 M. C. C. 251, 254; *Isidore Kaplan*, 20 M. C. C. 70, 71.

[25] *Luther Jones*, 18 M. C. C. 253.

[26] *Samuel Coralluzzo*, 8 M. C. C. 576; *William Beckley*, 3 M. C. C. 255, 256; *Leland M. Sheeley*, 3 M. C. C. 387, 388; *W. O. Standring*, 26 M. C. C. 257, 258; *F. W. Myers*, 23 M. C. C. 451, 453.

[27] *H. A. Connor*, 1 M. C. C. 327, 328; *G. W. Rickerd*, 10 M. C. C. 89, 90; *Howard R. Hunt*, 3 M. C. C. 261, 264; *Ziffrin's Overnite Express, Inc.*, 28 M. C. C. 379, 381; *Marvin R. Newton*, 4 M. C. C. 227.

Similarly, interruptions of service which are consequent upon the incidence of ordinary business hazard are not beyond a carrier's control. Diversion of freight to a low-bidding competitor,[28] or to a competitor claimed to be doing business illegally,[29] loss of business occasioned by a shipper's failure to renew its contract,[30] by the shipper's moving away,[31] or its deciding to haul its traffic in its own trucks[32] have not been held causes of interruption over which carriers have no control. In the same category are cases where discontinuance of operations has been owing to financial difficulties resulting in insolvency or loss of equipment,[33] in voluntary[34] or involuntary[35] receivership, or in voluntary[36] or involuntary[37] bankruptcy. In none of these situations has the Commission undertaken to determine control over interruption on the basis of underlying cause; instead, it has considered the circumstances objec-

[28] *Emma Berger*, 11 M. C. C. 43, 44.

[29] *Frances B. Murphy*, 19 M. C. C. 727, 734.

[30] *Coast Line Express, Inc.*, 9 M. C. C. 427, 428.

[31] *R. E. Riddle*, 22 M. C. C. 204, 206.

[32] *Burlington Truckers, Inc.*, 29 M. C. C. 345.

[33] *Murray Feigenbaum*, 1 M. C. C. 745; *Truck Transport, Inc.*, 22 M. C. C. 70, 71; *Guy W. Brown*, 23 M. C. C. 125, 127; *White Star Freight Line, Inc.*, 23 M. C. C. 407, 408; *Mutual Transit Co., Inc.*, 23 M. C. C. 657.

[34] *Burlington Truckers, Inc.*, 29 M. C. C. 345.

[35] *Sunset Trail Express, Inc.*, 22 M. C. C. 713; *Puget Sound-Portland Lines, Inc.*, M. C. 15603, Sept. 27, 1941.

[36] *Klaus E. Tapis*, 2 M. C. C. 18; *Henry A. Welz*, 28 M. C. C. 451.

[37] *Gregg Cartage & Storage Co.*, 10 M. C. C. 255, 21 M. C. C. 17.

tively and has held the carrier charged with factual control over interruptions of service wherever those were attributable to business difficulties.

Consistently with that view the Commission has not attempted to distinguish between forms of insolvency proceedings which result in an interruption of service; whether a bankruptcy is voluntary or involuntary, or whether a receivership is in the first instance for liquidation or is originally for operation, which later turns out to be impossible, has not been thought significant. The controlling consideration has been the cessation of operations owing to business reverses.

The Government urges that this course of administrative construction of the statute should be sustained.

4. *Effect of the rule on bankruptcy administration.*—The dissenting Commissioners stated (R. 67–68, 80–81) and appellants now contend (Br. 40–42) that the effect of the Commission's rule concerning bankruptcy as a cause of interruption within a carrier's control is to make it impossible for a motor-carrier business to emerge from a financial composition and reorganization in possession of "grandfather" operating rights. On the contrary, it is plain that where operations have continued uninterrupted during receivership [38] or bankruptcy [39] the rights emerge unimpaired.

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[38] *D. L. Hartman Cartage Co.*, 18 M. C. C. 4.

[39] *Kirk Transportation Co.*, 7 M. C. C. 363; *Universal Interstate Freight, Inc.*, 30 M. C. C. 13.

As appellants state in their brief (Br. 35–36), a bankruptcy receiver or trustee is not empowered merely by virtue of appointment to conduct the business of the bankrupt estate; a specific authorization is required, and he is under no duty to apply for one. The result is that where the court believes that continued operation is impossible or is against the financial interests of the estate, there will be an interruption in the bankrupt carrier's service which extinguishes the carrier's rights. We think that this is a reasonable result; if operations are conducted during bankruptcy, the public interest in continuation of particular transportation is served; if they are not, shippers must find other means of carriage, and the interrupting carrier's reentrance into the field will produce a surplus of transportation facilities.[40]

It is said that the Commission's rule destroys a bankrupt's assets; but the value of "grandfather" rights is likely to have been merely nominal where the bankruptcy court has declined to authorize a continuance of operations.[41] In any event, the whole of petitioner's argument on the

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[40] This point is discussed more fully at page 16, *supra*.

[41] In all probability the bankruptcy court in the present case was influenced by Gregg's method of transportation, through owner-operators, and concluded that it would be impractical for a court officer to attempt to carry on the business through their agency. Thus the company's rights here were particularly volatile by reason of the nature of its operations.

present point is without foundation since the Bankruptcy Act does not purport to enlarge the property rights of the bankrupt and only empowers the bankruptcy court to dispose of such property as the bankrupt may be found to have by reference to other sources of substantive right, including the Motor Carrier Act properly construed.

D. LENGTH OF INTERRUPTION

Appellants also challenge (Br. 26–27) the statement by the majority of the entire Commission on reargument (R. 75), "* * * it is useless to speculate upon the question whether the 'grandfather' right [of Gregg Company] expired before or after the sale [to Northeastern Transportation Company]", contending that it indicates a failure on the part of the Commission to make any finding concerning the length of interruption in service and that in consequence the ultimate determination of a fatal break was arbitrary. This argument overlooks entirely the reason given by the Commission for its statement and the Commission's treatment of interruption in analogous situations.

The report stated that the interruption in Gregg's service after the sale to Northeastern, as well as before, was to be ascribed to the bankruptcy because the receiver's transfer of rights was ineffective for purposes of the Motor Carrier Act until the Commission had approved it; the

seller must ordinarily continue its operations to the date of such approval to avoid the consequence of a fatal interruption. See *H. H. Enders Truck Line, Inc.*, 29 M. C. C. 639, 643. This approval is effected through the filing by the purchaser of an application for substitution in the main "grandfather" clause proceeding before the Commission; the Commission then acts on the application, and, when it is granted, the risk of not continuing operations devolves on the purchaser. The Commission's requirement that it approve a transfer of rights is entirely reasonable in view of its interest in seeing that an alleged purchaser is actually the successor in interest to the rights of a "grandfather" applicant and in rendering the purchaser amenable to the Commission's eventual order in the principal proceedings.[42]

If the Commission grants an application for substitution shortly after the application is filed, at a time when the merits of the principal "grandfather" application have not been determined, the purchaser must then, nevertheless, operate the transportation service in order to preserve the "grandfather" rights against an interruption within the *purchaser's* control. *Cook & Koch*, 27 M. C. C. 361 (bill of carrier to enjoin order dis-

[42] This requirement of the Commission's approval of transfer of "grandfather" rights is now embodied in regulations of the Interstate Commerce Commission promulgated July 1, 1938. 3 Fed. Reg. 2157, Rule 1 (d).

missed February 3, 1942, District Court of the United States for the Northern District of Illinois); *Louis C. Dearman*, 27 M. C. C. 619 (bill of carrier to enjoin order dismissed January 28, 1942, District Court of the United States for the Northern District of Ohio). The eventual right of the purchaser to a certificate of public convenience and necessity remains subject to the Commission's decision on the original application. *Crouch Transportation System, Inc.*, 26 M. C. C. 433; accord, *Brooks Transportation Co., Inc.—Purchase—Jacobs Transfer Co.*, 5 M. C. C. 85. Thus the purchaser may be induced to incur considerable expense in undertaking operations during the interim, when ultimately it may be held that the purchaser acquired no operating rights at all; the hardship that would result in such a case is apparent.

To forestall its occurrence, the Commission has promulgated a regulation which provides against the granting of an application for substitution where at the time of filing it appears that an interruption of service is current unless the interruption is shown to be beyond the carrier's control or unless present operation, by the purchaser, is required in the public interest. Regulations of July 1, 1938, 3 Fed. Reg. 2157, Rule 6. This regulation was not in force when Northeastern's application for substitution was filed, January 7, 1938. However, a practice corresponding to the provisions of Rule 6 was then followed by the

Commission in the few cases where it appeared at the time of application for substitution that an interruption of service had occurred. *Gregg Cartage & Storage Co.*, 10 M. C. C. 255, 21 M. C. C. 17. Accord, *Plaza Exp. Co., Inc.—Purchase—Wisconsin Motor Exp. Co.*, 35 M. C. C. 447, 22 M. C. C. 633. Accordingly, in the present case the Commission declined to approve at once the application of Northeastern to be substituted in the place of Gregg.

The effect of the dispositions made by the Commission in the present case is that a fatal interruption in Gregg's service had occurred by January 7, 1938. The elapsed time, chargeable to Gregg, was at least 69 days, since operations had ceased by October 30, 1937. In view of the nature of Gregg's service, as distinct from that of a carrier performing seasonal service only, it would seem clear that the Commission was justified in holding that the length of interruption was such as to extinguish the "grandfather" rights. That administrative determination ought not to be disturbed.

Appellants have pointed to the decision in *H. H. Enders Truck Line, Inc.*, 29 M. C. C. 639, as inconsistent. No bankruptcy occurred there; the interruption chargeable to the carrier commenced only after the sale of rights by the "grandfather" applicant and occupied a very much shorter period

than Gregg's interruption. In the interim of interruption operations were not conducted only because the carriers had been advised by officers of the Interstate Commerce Commission shortly after sale that operation would be illegal without prior approval of the sale by the Commission. Application for approval was then made immediately, and delay beyond this date until the time of official filing was occasioned only by a return of the application to secure further information. *Id.* at 640. As the Commission stated, its postponement of decision on the application for substitution was unusual in such a case; nevertheless, the interruption in service after the date of application would not be counted against the carriers.

For the reasons now stated we think that the Commission's statement quoted above at page 29 and complained of by appellants is not open to objection, and that the Commission's decision on the *Enders* application affords no basis for reversal here.

E. THE EFFECT OF SECTION 212 (A) OF THE MOTOR CARRIER ACT

Commissioners Lee, Porter, and Caskie based their dissent in part upon the ground that the result of the majority decision is to discriminate against carriers whose service has been interrupted before the time when their "grandfather" applications have been acted on by the Commission and

in favor of those who already possess "grandfather" certificates when interruption occurs (R. 68–69, 79, 80); appellants advance this ground as an additional reason why the Commission's order in the present case should be set aside (Br. 19–22).

Section 212 (a) of the Motor Carrier Act, 1935, provides that the Commission may revoke a certificate for failure by the carrier to comply with its terms,[43] but that the revocation shall not become effective unless within a specified period[44] the carrier wilfully fails to comply[45] with an order of the Commission commanding obedience to the terms and conditions of the certificate. Appellants' contention (Br. 19) that the Commission should have given the benefits of this statutory section to Gregg Company is clearly unsound, as the section in terms is applicable only where a certificate has been issued. Redress against any inequality which may arise from the absence of a

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[43] The Commission, pursuant to the authority conferred in section 208 (a) of the statute, has made the requirement of continuous operation an express condition of every certificate by providing that "this certificate shall remain in force for such period as the said carrier shall continue to perform the services herein authorized."

[44] Originally the period was 90 days. By an amendment of June 29, 1938, 52 Stat. 1238–1239, it was reduced to 30 days.

[45] In *Smith Bros.*, 22 M. C. C. 524, 525, the Commission held that cessation of operation due to bankruptcy was a "willful" failure to comply with the requirement, within the meaning of section 212 (a).

similar section protecting uncertified "grandfather" rights must be sought through legislation.

In enacting section 212 (a) Congress sought to safeguard from destruction rights that had been established, by authorizing a period of grace in which the carrier could preserve its licensed status by compliance with an order of the Commission directed to enforce an administrative regulation or one of the conditions contained in the carrier's certificate; the section was not designed specifically to deal with interruptions of service, but to cover infractions of many kinds. It is therefore not available to reflect by analogy the legislative intent in making provisions in the "grandfather" clause concerning interruption of service. Until a certificate has been granted, the inquiry remains confined to the *existence* of operating rights. In determining that question, whether a carrier has any "grandfather" rights, the Commission is not bound in interpreting the statutory language by other provisions which incidentally have come to be applicable in the case of interruption in the service of a carrier already certified to possess transportation authority.

CONCLUSION

The Commission properly denied the application for a certificate of public convenience and necessity in view of the interruption in Gregg Company's service as a common carrier after October 30, 1937. It is therefore respectfully sub-

mitted that the decree of the District Court dismissing appellants' complaint should be affirmed.

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FEBRUARY 1942.

APPENDIX

The relevant provisions of the Motor Carrier Act, 1935, Act of August 9, 1935, c. 498, 49 Stat. 543, 551, 555, as amended by the Act of June 29, 1938, c. 811, 52 Stat. 1236, 1238–1239, are as follows:

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part (U. S. C., title 49, sec. 302 (a)).

* * * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public conveyance and necessity issued by the Commission authorizing such operations: *Provided, however,* That subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and neecssity will be served by such operation. * * * (U. S. C., title 49, sec. 306 (a)).

SUSPENSION, CHANGE, REVOCATION, AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or

license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (d), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: * * * (U. S. C., title 49, sec. 312 (a)).

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SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1941.

Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Northern District of Ohio.

[April 13, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

This appeal is from a judgment of a statutory three-judge court denying appellants' petition to set aside an order of the Interstate Commerce Commission refusing the Gregg Cartage & Storage Company a certificate of public convenience and necessity under the so-called grandfather clause of § 206(a) of the Motor Carrier Act, 1935, 49 U. S. C. § 306(a).

The Gregg Company, an Ohio corporation, operated in 1935 and earlier as a common carrier of general freight between points in several northeastern states. In a number of important cities it maintained terminals at which freight was assembled. It performed no over-the-road carrier service with its own vehicles, but provided such service entirely by the use of so-called owner-operator vehicles. Such vehicles as it owned and operated directly were used in cartage in and about Cleveland.

On February 12, 1936, the Gregg Company filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity as a common carrier under the grandfather clause of § 206(a) of the Motor Carrier Act. A hearing was held on June 8 and 9, 1937, before an examiner who, on December 17, 1937, recommended that the certificate be granted.

Meanwhile, the Gregg Company had failed and ceased to operate. It had arranged the filing on October 4, 1937, of a creditor's bill in a state court of Ohio, which on the following day ap-

pointed the company's counsel to be its receiver with authority to continue the business. On the day of this receiver's appointment other creditors filed a petition in bankruptcy in the United States District Court for the Northern District of Ohio, Eastern Division, which on October 27 adjudicated the company a bankrupt, and on October 30 appointed a receiver to preserve the assets of the estate pending the election and qualification of a trustee.[1] In operating the business, the state court receiver confined himself to the completion of shipments en route, and did not solicit or accept new business. On October 14, he filed with the Commission a petition for permission to suspend operations without prejudice to rights under the grandfather clause. The Commission, of the opinion that it lacked power to authorize such a suspension, denied this petition on November 30, 1937. The receiver in bankruptcy took over the business on the day of his appointment, and conducted no operations at any time. Pursuant to an order of the bankruptcy court, on December 6, 1937, he sold the trade names and good will of the bankrupt estate, together with its rights under the grandfather clause application, to appellant, Northeastern Transportation Company, for $850 at public auction.

On January 7, 1938, Northeastern and the receiver in bankruptcy filed a joint application with the Commission asking that Northeastern be substituted as applicant in lieu of Gregg. The Commission withheld action until it had determined Gregg's rights. Northeastern considered a resumption of operations, but decided against it on the advice of field representatives of the Interstate Commerce Commission.

A further hearing before another examiner, confined to the circumstances of the interruption of Gregg's service, resulted in another recommendation of the issuance of a certificate under the grandfather clause. The Commission, however, denied the application December 12, 1939, after a rehearing following the report of Division 5, a majority of which had held similarly on November 14, 1938. 10 M. C. C. 255, 21 M. C. C. 17. The Commission ruled that an interruption of service within the control of the applicant had occurred, that the purchase by Northeastern had conferred no operating rights, and that therefore neither corporation was entitled to a certificate under the grandfather clause. Five commis-

[1] The trustee in bankruptcy, an appellant here, was appointed near the end of December, 1937.

sioners dissented. Gregg and its trustee in bankruptcy then filed a complaint in the United States District Court for the Northern District of Ohio, Eastern Division, praying that the order of the Commission denying Gregg's application be annulled and set aside and that the Commission be directed to issue a certificate of public convenience and necessity to Gregg. A statutory court of three judges was convened, Northeastern was allowed to intervene, and judgment went against the complainants, who appealed to this Court, which noted probable jurisdiction.[2] 42 F. Supp. 266.

Appellants contend that the Commission and the court below erroneously construed § 206(a)[3] of the Motor Carrier Act in holding that, excepting the specified interruptions of service, the statute required continuous operation from June 1, 1935, until the hearing by the Commission on the application. We have, however, held to the contrary. *United States* v. *Maher*, 307 U. S. 148, petition for limited rehearing denied, 307 U. S. 649. *Hoey* v. *United States*, 308 U. S. 510; *Lubetich* v. *United States*, 315 U. S. 57.

Appellants contend alternatively that the Commission should be reversed for refusing to hold that the applicant "had no control" over the cessation of operations.

From October 15, 1935 to December 31, 1936, Gregg was insured against public liability and property damage by an insurance company which in 1936 failed either to dispose or settle certain claims against Gregg and was rumored to be insolvent. For these reasons Gregg cancelled its contract with this company and obtained similar insurance with another company, paying the premiums in advance. The failing insurance company was adjudged a bankrupt in January of 1937, and ceased to pay any claims. Gregg, thereby left with the burden of satisfying claims for personal injury and property damage arising during the period when it had carried insurance in the bankrupt company, paid some of them in the later months of 1937; but approximately 175, estimated to aggregate in their face amount about $200,000, re-

[2] Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. § 47a.

[3] This provides in pertinent part that: "if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . except . . . as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation." 49 U.S.C. § 306 (a).

mained unpaid. It also paid about $15,000 on claims for cargo loss and damage, which two other insurers, relying upon "technical" insurers' defenses, refused to pay. All policies of insurance taken out by Gregg had the required approval of the Interstate Commerce Commission.

Solvent on June 30, 1937, Gregg had become insolvent by October 30, 1937. When it appeared impossible to satisfy all demands in full, resort was had to the friendly receivership in the state court. This precipitated the involuntary bankruptcy in the federal court, which in turn brought operations to a halt.

The Commission based its refusal to find that the applicant "had *no* control" over the interruption of service upon the fact that such interruption followed upon an adjudication of bankruptcy resulting from the unsuccessful conduct of its business affairs, and did not go back of the adjudication to find and give detailed consideration to the particular causes of the failure. Appellants contend that this was error, and for a rule requiring that in every case of this sort the Commission must trace out the chain of causation and weigh the bankrupt's judgment against the pressures of circumstance. We sustain the Commission in construing the statute as not requiring it to go back of the bankruptcy adjudication to search for ultimate causes.

How far one by an exercise of free will may determine his general destiny or his course in a particular matter and how far he is the toy of circumstance has been debated through the ages by theologians, philosophers, and scientists. Whatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct. Certainly that assumption must be made in reference to a corporation such as the applicant. Society, in creating a corporation, vesting its management in a board of directors, granting it large powers and not inconsiderable immunities, can hardly allow that its business affairs are at any time out of the control of those whose duty it is to conduct them. The Bankruptcy Act states that even an involuntary adjudication results only from some "act of bankruptcy," defined upon the clear assumption that it is within the bankrupt's

control.[4] Whether or not this assumption squares with philosophical doctrine, or even with reality,[5] is not for our determination. The Commission, and the courts too, must get on with the application of the federal statutes without waiting to settle the verity of the philosophical assumptions on which they rest.

The Commission was warranted in holding as matter of law that the interruption because of bankruptcy was not one over which the applicant had no control within the meaning of the Motor Carrier Act. The complexity of the chain of causation shown in this case makes it an apt illustration of the impracticability of any other rule.

When it found itself unable to meet its obligations, Gregg arranged a receivership in the state court securing the appointment of its own counsel as receiver. Only the one creditor which filed the bill appears to have been consulted. Thus, the petitioner not only arranged deliberately to commit an act of bankruptcy, but it managed the affair in a manner not unlikely to provoke the unconsulted creditors to file a petition in bankruptcy—presumably considered their best or only means of obtaining the disinterestedness in the administration of the estate to which they were entitled.

The claims which, together with the advance payment of premiums for new insurance, constituted the immediate cause of Gregg's financial difficulties, were, as we have said, of various sorts. Bulking largest were those for personal injuries and property damage, which numbered approximately 175 and in their face amount aggregated approximately $200,000. Their precise nature is not disclosed by the record, and conjecture in this regard is made particularly difficult by Gregg's method of doing business—which was to avail itself entirely of "owner-operator" vehicles for its "over-the-road" services. Doubtless these claims were founded almost entirely upon the negligent operation of vehicles for which Gregg was in some way held legally responsible. We are not informed whether such responsibility rested upon the principle of *respondeat superior*, express contractual assumption, or both. The

[4] The following are defined as acts of bankruptcy: (1) fraudulent conveyances or concealments of property, (2) transfers while insolvent, (3) permitting, while insolvent, a creditor's lien to attach to property through legal proceedings, (4) assignments for the benefit of creditors, (5) permitting or procuring, while insolvent in either the bankruptcy or equity sense, a receiver to be appointed to take charge of the bankrupt's property, (6) admissions in writing of inability to pay debts and of willingness to be adjudged a bankrupt. § 3a of the Act of July 1, 1898, 11 U. S. C. § 21(a).

[5] Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harvard Law Review 189.

rest of the claims, upon which about $15,000 were paid, were for cargo loss and damage. The record does not show whether payment was made solely to retain the good will of shippers, or also to satisfy the applicant's legal liability—which would have rested upon its legal control of the cargo.

It is true that Gregg would not have had to bear the burden of most, if not all, of the claims, had it not been for some unfortunate experiences with insurance companies. Its major misfortune was the failure of the company in which it carried its insurance against liability for personal injury and property damage. What consideration actuated the choice of the particular insurance company and what caution, if any, was observed in selecting it, do not appear. It either misunderstood the coverage of its other policies or purchased policies not specifically comprehensive, and found itself taking care of very substantial claims for cargo loss because of "technical" insurers' defenses which seem to have been sufficient under the Ohio law.

In any event, the choices of insurers, as well of its servants and operators, were Gregg's own—as was the judgment which was exercised with regard to the numerous other phases of its business bearing upon its solvency—and the final product could not have been a matter over which it had *no* control.

Furtherrnore, the interruption of service was the deliberate act of those who for the time being stood in the position of applicant and owned its rights. During the interval between receivership and sale of these rights to Northeastern, we take it that the beneficial interest therein vested in the creditors and the legal title in the receiver or trustee. The federal receiver or trustee could have been authorized to conduct the business of the bankrupt for a limited period, if in the best interests of the estate. § 2 of the Act of July 1, 1898, as amended, 11 U. S. C. § 11. The creditors and their representatives, however, failed to seek such authority, evidently regarding the rights, which later sold for $850, not worth the expense and risk of continuing business. It is the purchaser Northeastern, organized to acquire the "grandfather" rights, and to an undetermined extent identified with the management of the bankrupt,[6] which, having bought these rights in this state of voluntarily

[6] The Commission found that Northeastern was incorporated to take over the bankrupt's rights and business, that the former president of Gregg is the new company's general freight agent, and the former superintendent of

suspended animation, seeks to revive them. But it cannot say that it takes the rights free of any impairment by the voluntary suspension of operation by the then owner from whom it derives title.

The applicant for a certificate under the grandfather clause seeks to exempt his further operations from scrutiny as to public convenience and necessity. If he is able to meet those tests, he may be authorized to operate, even if he never had grandfather rights, or if those he once had have been lost. As the Motor Carrier Act is remedial, and the grandfather clause confers a special privilege, the proviso defining exceptions is to be held to extend only to carriers plainly within its terms. *McDonald* v. *Thompson*, 305 U. S. 263, 266.

In its opinion the Commission stated that "it is useless to speculate upon the question whether the 'grandfather' right expired before or after the sale." This we understand to mean that, having determined that the cessation of operations was not a matter over which Gregg "had no control," the Commission was of opinion that by the time of the sale the cessation of operations was of sufficient duration—at least 69 days—to establish that Gregg had not been "in . . . operation since" June 1, 1935, within the meaning of § 206(a). This was a reasonable conclusion, especially since any substantial interruption of one carrier's service tends to result in expansion of other facilities to meet the continuing needs of shippers, and thus to cause overcrowding if the suspended service is resumed.

Finally, appellants claim to be entitled to relief from prejudice said to have resulted from delay of the Commission in acting on Gregg's application made under § 206(a) on February 12, 1936. They point out that had the Commission acted at once a certificate would have issued, thus conferring the benefits of § 212(a).[7] But

transportation is a stockholder of the new company; and that "other connections, if any, between the companies through their respective officials and employees cannot be determined from the records."

[7] This reads in part as follows: "That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission with a lawful order of the Commission, made as provided in section 204(d), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder." 49 U. S. C. § 312(a).

Originally the period was 90 days. By an amendment of June 29, 1938, 52 Stat. 1239, it was reduced to the present 30 days.

by its terms § 212(a) is applicable only where a certificate has already issued; and, being a section of general applicability, at least for present purposes, it has no analogical bearing upon the construction of the specific provision relating to interruptions of service made in § 206(a). The delay in passing upon the application was considerable and regrettable, as the Commission acknowledged, but it does not seem to have been arbitrary or the result of any deliberate discrimination, nor, in view of the magnitude of the Commission's task, unreasonable. The Commission had nearly 90,000 applications to pass upon under § 206(a), and of course could not have been expected to pass upon them simultaneously. It is not within our province to remedy inequalities necessarily incident to the administration of the statute.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1941.

Gregg Cartage & Storage Company, Hugh Wells, Trustee in Bankruptcy of the Gregg Cartage & Storage Company, and Northeastern Transportation Company, Appellants, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Northern District of Ohio.

[April 13, 1942.]

Mr. Justice Douglas, dissenting.

I cannot believe that experts of the subject—say, referees charged with the duties of administering the bankruptcy law—would conclude that every bankruptcy arose without exception from conditions which were within the "control" of the bankrupt in any accepted meaning of the word. Nor do I think that that view would be taken in case of receiverships. Yet that is the irrebuttable presumption which the Commission has created in this type of case. Congress did not create it. Congress merely provided that this class of carrier had a right to the statutory grant on a showing, *inter alia*, that it was in "bona fide operation as a common carrier by motor vehicle on June 1, 1935" and "has so operated since that time" except as to "interruptions of service over which the applicant or its predecessor in interest had no control." Motor Carrier Act of 1935, § 206(a); 49 U. S. C. § 306(a). I would have supposed that the question of "control" was "an issue of fact to be determined by the special circumstances of each case." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145. That would mean that "So long as there is warrant in the record for the judgment of the expert body it must stand." *Id.* pp. 145-146. But that is quite different from giving the word "control" a construction which prevents a person from showing under any circumstances that the events which led to his business disaster were not subject to his "control". On the one hand, the Commission rules that

interruptions of service owing to floods,[1] snow,[2] unsafe[3] or impassable[4] roads, highway construction,[5] droughts which destroy a carrier's chief source of business,[6] ill health,[7] strikes,[8] or the illegal action of governmental authorities[9] constitute grounds for holding that an interruption of service is beyond an applicant's "control". But similar misfortunes of a purely accidental character which affect financial stability and end in bankruptcy or receivership are held as a matter of law to be subject to the carrier's "control".

The distortion which that interpretation involves is well illustrated by this case. There was evidence tending to show the following: During the year 1936 the applicant was insured against public liability and property damage by the Central Mutual Insurance Co. Hearing rumors that Central Mutual was in financial difficulties and was not paying claims, applicant dropped its policy in December 1936 and placed its insurance with another company. On January 11, 1937, Central Mutual was adjudged a bankrupt, and ceased payment of all claims. In the fall of 1937 applicant was forced to pay several substantial damage claims arising from accidents during the period when its insurance policy was in effect with Central Mutual. These payments seriously impaired its working capital. Furthermore, applicant was confronted with approximately 175 additional claims for personal injury and property damage. These were estimated at about $200,000 and arose during the period when applicant was insured by Central Mutual. Applicant settled some of these claims. It was impossible, however, to satisfy the demands of all of these claimants. Receivership followed and on its heels came bankruptcy. There is not the slightest evidence in this record of any negligence, dereliction, or mismanagement on the part of applicant. It is undisputed that its failure was due to the failure of its insurer. And there is no evidence in this record that it did not exercise due care in the

[1] Waltz Transportation, Inc., 10 M. C. C. 30, 33.

[2] Lewis McKay, 4 M. C. C. 93, 94.

[3] Edwards Motor Transit Co., Inc., 2 M. C. C. 73, 74.

[4] Inter-Carolinas Motor Bus Co., 21 M. C. C. 633, 635; Walter Stages, Inc., 24 M. C. C. 451, 454.

[5] Magee Truck Lines, Inc., 28 M. C. C. 386, 389.

[6] Barnes Truck Co., Inc., 24 M. C. C. 465, 467.

[7] H. Bruce Blackburn, 20 M. C. C. 747, 748-749.

[8] Motor Freight Express, 26 M. C. C. 374, 375; Transamerican Freight Lines, Inc., 28 M. C. C. 493, 502.

[9] W. H. Tompkins Co., 29 M. C. C. 359, 362.

selection of that insurer. It would indeed be ironical to cast a presumption against the applicant on that score when the insurance policy presumably was accepted by the Commission, and under its regulations promulgated pursuant to §§ 211(c) and 215 of the Act (49 U. S. C. §§ 311(c) and 315) had to be "approved" by it.[10] Federal Register (1936) Vol. 1, p. 1163, Rule 1. And see 49 Code of Federal Regulations, Pt. 174, § 174.1.

An applicant carries the burden of establishing his right to the statutory grant which is contained in the "grandfather" clause. *Alton Railroad Co.* v. *United States*, 314 U. S. —. But he should not be met at the threshold with a conclusive presumption against him unless Congress has clearly indicated that in the circumstances of his case he has no right even to undertake the burden of proof. If Congress had desired to eliminate all applicants whose continuous service was interrupted by bankruptcy or receivership, I believe it would have said so. As stated by Commissioner Lee in his dissenting opinion (10 M. C. C. p. 263): "If such interruptions in service are to be construed as putting an end to 'grandfather' rights of carriers, whose applications therefor have not been determined, then, where such a carrier goes into receivership or bankruptcy, and such an interruption occurs, it would be impossible for the carrier to come out of receivership and resume operations; it could not effect a composition or an arrangement with its creditors and resume operations; if a corporation, it could not be reorganized under the corporate reorganization provisions of the Bankruptcy Act, and creditors could realize nothing from 'grandfather' rights, however valuable." Such a wholesale destruction of operating rights should not be readily or lightly inferred. Operating rights are the very life of any business. Without them this business certainly has no more than scrap value.

Great deference is owed a commission's interpretation of the law which it enforces, especially where the meaning of the statutory language, generally or in specific application, gains body and flavor from the content of the highly specialized field in which the expert body works. See *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Gray* v. *Powell*, 314 U. S. —; *Alton Railroad Co.* v. *United States*, *supra*. But that is quite different from acceding to the suggestion

[10] And see Federal Register, *op. cit.*, Rule IX; 49 Code of Federal Regulations, Pt. 174, § 174.9.

that the non-technical word "control" may be interpreted in a way which goes against all human experience and which does violence to its ordinary and accepted meaning. In this connection it should be noted that if the misfortune which ended in bankruptcy or receivership was not subject to the carrier's "control", then an interruption of service made by the trustee or receiver cannot be attributed to him. Once the court acquires jurisdiction over the estate, the affairs of the business are in its hands, not the debtor's.

Congress has provided that those who attained a position in the competitive transportation system should be allowed to retain the fruits of their struggle. Whether that policy was wise or unwise is not for us to appraise. But we should not permit those statutory grants to be whittled away on the basis of technical and legalistic grounds which find no expression in the statute however much the administrative chore may be alleviated. If the services of a carrier have been interrupted by bankruptcy or receivership, his burden of proving that that default was not subject to his "control" may be onerous. Perhaps in most cases he could not maintain it. But he should be given the opportunity to do so. It is hard for me to imagine a clearer case where he probably could succeed than this one. Yet before we passed on that issue, as the opinion of the Court undertakes to do, we should remand the case to the Commission. For it made no findings on that issue but invoked an irrebuttable presumption which would automatically foreclose in all cases an opportunity to be heard on the real cause of the bankruptcy or receivership.

Mr. Justice BLACK and Mr. Justice BYRNES join in this dissent.